Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-928

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, CLC, *et al.*,
Petitioners,

v.

NATIONAL REJECTORS INDUSTRIES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CONSTANGY, BROOKS & SMITH
LOVIC A. BROOKS, JR.
EDWARD KATZE
CHARLES A. EDWARDS
Attorneys for Respondent

1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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QUESTION PRESENTED

Is the determination below one which requires or justifies the exercise by this Court of its discretionary review powers?

STATUTORY PROVISIONS AND RULES INVOLVED

Rule 19. Rules of the Supreme Court of The United States:

Rule 19. Considerations Governing Review on Certiorari.

1. A preview on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where

there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or had decided an important state or territorial question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. The same general considerations outlined above will control in respect to petitions for writs of certiorari to review judgments of the Court of Claims, of the Court of Customs and Patent Appeals, or of any other court whose determinations are by law reviewable on writ of certiorari.

All other pertinent statutes and rules are reproduced in the Petition for Certiorari.

STATEMENT OF THE CASE

Respondent National Rejectors Industries (NRI) agrees with the first paragraph of petitioners' "Statement of the Case." Beyond that point, however, petitioners have presented an argumentative version of the facts, including matters not of record in the proceedings below, which constrain NRI to provide the

Court with a statement of the case which is more accurate, more objective and contains citations to the record.[1]

On October 15, 1976, petitioner Frankie Joe Russell tore up a stack of label orders which had been placed at his work station. [T. 71.] For this insubordinate act, Russell was given a written warning. [T. 71.] Russell, the president of petitioner Local 6178, promised NRI's Director of Personnel and Industrial Relations that if the warning were not removed from Russell's personnel file the Company would be "swamped" with so many grievances that the plant would be shut down. [T. 71-72.] The warning remained in Russell's file, whereupon NRI began receiving a large number of "harassment-type grievances" as a result of the Union's "shopping for grievances wherever possible." [T. 37.]

On November 22, 1976, NRI requested that an investigation be held pursuant to Article XV, Section 4 of the collective bargaining agreement between NRI and the petitioner Unions.[2] [T. 45, 50, 64-66, 74-77.] On December 6, 1976, the results of that investigation were reported to the Company. [T. 75-77.] NRI then requested that Russell be removed from grievance handling, with the Union's designated Step 3 representative proceeding with the pending grievances. [T. 65-66.]

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[1] Respondent notes that in the Court of Appeals the Union was satisfied with "most of" the trial court's findings of fact. [Appellant's Brief, p. 4.] Record references herein are to the Transcript of Hearing in the trial court on March 29, 1977, cited as "T. . . .," and to exhibits introduced at that hearing or theretofore.

[2] "The Company and Union agree to meet in good faith and make as honest an effort to settle grievances at the lowest level of the grievance procedure as is possible. Representatives of the parties shall meet as equals and present and discuss facts of the grievances in a business-like, orderly manner. *Should the actions of the representatives of either party be such that the integrity of the grievance procedure is threatened, then the authorized 3rd step representative of the Company or Union shall notify the opposite party who shall investigate and report back the results of such investigation and the corrective action taken, if any.* If such report is not satisfactory or

On December 15, at a meeting between NRI management representatives, Union officers and some other employees, Russell threatened bodily harm to NRI's Plant Manager. [T. 73-74.] As a result of that altercation, Russell was suspended for purpose of discharge and two other Union officers received thirty-day suspensions. Russell's suspension was converted to a discharge on December 20. Grievances were filed by the Union challenging the discharge and suspensions. [Plaintiff's Exhibit 2.]

Grievances continued to be filed but, due to the Union's lack of willingness either to comply with Article XV, Section 4 or to advance the Russell discharge grievance to arbitration, no meetings were held under the contractual grievance procedure. [T. 46-47] The failure to conduct meetings with Russell present was also the subject of a grievance. [Plaintiff's Exhibit 2.]

In late January, the Union filed unfair labor practice charges with the National Labor Relations Board concerning the Russell discharge, the two suspensions and the failure to meet. [Affidavit of petitioner Stiles in support of Motion to Dismiss, Exhibit A.] After these charges were filed, the Union refused to discuss grievance handling on the basis that such problems were "a matter of litigation." [T. 34-82]

In early February, 1977, faced with a situation in which employees, instead of working, were wandering about the plant,

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if the facts are in dispute either party may request a meeting for the purpose of determining the facts and settling the issue. If the issue is not satisfactorily settled at this meeting either party may request the other to take such action as may be appropriate and necessary to correct the problem. In this event, *the grievance machinery shall continue to function with the next highest officials of the Company and Union conducting the meetings to insure the processing of grievances in a timely manner until such time as both parties are agreed that normal operation of the grievance procedure can be resumed.*" (Emphasis supplied.)

playing checkers, reading newspapers and working crossword puzzles, NRI proposed a productivity program and urged the Union to comment on its contents. [T. 68-69] The Union refused to meet concerning the program without having Russell present, while the Company refused to confer with Russell in attendance. [T. 52-55, 70] The productivity program was then explained to employees in letters and in group meetings. [T. 53] Among the new procedures contained in the program were work rules designed to record employees' time away from their work stations by use of a logging system. [T. 58]

During the group meetings, petitioner Lishbrook, Vice-President of Local 6178, stated her defiance of the productivity program and urged other employees to violate the procedures then under discussion. [T. 69]. Several days thereafter, the productivity program was put into effect; a grievance was filed by the Union regarding the implementation of the program. [Plaintiff's Exhibit 2.]

In the three work days following the implementation of the productivity program, more than half of the bargaining unit employees deliberately and repeatedly violated the logging procedures. [T. 67-68] Three-day suspensions for insubordinate conduct was imposed on those employees with as many as five violations. [T. 68]. The disruption caused by these employees resulted in a reduction in the Company's productivity to thirty per cent. [T. 59.]

The Company then urged the Union once more to arbitrate certain key grievances—the Russell discharge, the two suspensions, the grievance procedure dispute, and the productivity program—while the logging procedure would be held in abeyance. [T. 34-37] The Union refused, and this action was filed seeking injunctive relief to enforce the no-strike clause of the collective bargaining agreement and to compel the Union to

arbitrate or abandon the 217 grievances then pending. [T. 34-37.]

The trial court granted the requested preliminary injunction (95 LRRM 2145), whereupon the Union appealed. The United States Court of Appeals for the Eighth Circuit affirmed the trial court's decision in all respects, 562 F.2d 1069. Shortly thereafter, the Union filed the petition here *sub judice*.

REASONS FOR DENIAL OF THE WRIT

Both at trial and on appeal the Union advanced two arguments: (1) that the subject matter of this case fell within exclusive N.L.R.B. jurisdiction, and (2) that issuance of an injunction was violative of the Norris-LaGuardia Act. Having twice failed on both contentions, the Union now brings this Court two new arguments which it contends to be "important issues which have not been but should be decided by this Court." NRI respectfully submits, however, that the Union's strained interpretations of decisions of this Court are, while ingeniously contrived, no more than a transparent effort to create a "cert-worthy" issue where none exists. Simply stated, the standard of Supreme Court Rule 19(1)(b) has not been met and the petition should be denied.

1. The Injunction Was Properly Issued.

The keystone of the Union's argument is that employee concerted activity cannot be enjoined unless that concerted activity itself "threatens the arbitral process." Such a contention is not supported by either this Court's decisions in *Boys Markets*[3] and *Buffalo Forge*[4] or the uncontested facts contained in the record herein.

Proceeding first from the facts, it is glaringly apparent that NRI employees, counseled and supported by the Union and its agents, intentionally and deliberately interfered with the operations of the Company in violation of the obligations of Article

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[3] Boys Markets, Inc. v. Retail Clerks Int'l U., 398 U.S. 235 (1970).

[4] Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397 (1976).

XXXIV, Section 2 of the collective bargaining agreement.[5] The sophistic distinction advanced by the Union—that employees who deliberately violated the work rules by leaving their work stations without making log entries were not engaged in conduct which "jeopardized production and hence threatened the arbitral process"—is without any basis in logic.

Witness the Union's own language:

> [P]lainly work rules come in all varieties, from the trivial to the vital, and not every such breach—or every concerted such breach—will threaten the arbitral process . . . [T]he violations [of the work rule] in no way impaired production . . . Production was slowed solely because of NRI's self-destructive response to the concerted activity—mass suspensions—not by the activity itself . . . The effect of this behavior was to exert economic pressure on petitioners to concede on an important arbitrable issue: *viz*, whether NRI could refuse to process grievances so long as the local president was a member of the grievance committee.
>
> [Petition, pp. 13-14 and n. 4.]

Then, in a glaring misstatement, the Union plunges into *non sequitur:* "That this was indeed the Company's purpose was revealed when four days after promulgating the work rules the Company offered to cease enforcing them if USWA would concede on this issue." [*Ibid.*]

In fact, two months before the work rules were implemented the Union had filed a grievance challenging NRI's invocation and interpretation of Article XV, Section 4 of the collective

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[5] "The Union agrees that there shall be no strikes, slow-ups, stoppages of work, sit-down strikes, refusals to handle merchandise, material or equipment or other interference with the operations of the Company during the term of this Agreement."

bargaining agreement. This arbitrable grievance, effectively stood in the path of any discussion between the Company and the Union. Efforts to continue the grievance procedure were rebuffed by the Union due to the pendency of the NLRB charges; entreaties to arbitrate these key issues to allow the grievance procedure to resume its necessary functions were rejected. Then, faced with industrial anarchy, the Company made a last-ditch effort to sustain productivity only to be met with massive resistance on the part of the Union and its employee-members. The Company did *not* demand any "concession" of the Union. Instead, NRI recognized the stalemate created by the parties' inability to agree on the meaning of Article XV, Section 4 and requested the Union to allow an impartial third party to break the logjam. The offer to suspend enforcement of the work rules was designed to spur the Union into an agreement to resolve the crucial issues which had not only threatened but had totally destroyed the arbitral process and the preliminary steps of that process.

The Union also disingenuously overlooks the trial court's initial request that the Company extend its suspension of the work rules until the preliminary injunction hearing, as well as the fact that a new outbreak of mass violations occurred during the week prior to oral argument in the Court of Appeals, thereby requiring an emergency motion to be filed in that Court.

The trial court's injunction directed petitioners and employees under their direction and control to refrain from violations of the contractual no-strike clause, including interference with the operations of the Company, until such time as impediments to normal grievance processing could be removed through arbitration. Obviously stung by this judicial direction that the Union allow the Company to continue production, the Union now casts reason aside in an attempted comparison of the facts *sub judice* with those involved in ***Anheuser-Busch, Inc. v. Teamsters Local 633***, 511 F.2d 1097 (1st Cir.), *cert. denied*, 423 U.S. 875 (1975).

Anheuser-Busch was discovered by the Union on the eve of oral argument in the Eighth Circuit. Although clearly inapposite, that decision was there strenuously argued by the Union; the Eighth Circuit majority flatly rejected the Union's belated reliance on *Anheuser-Busch*, 562 F.2d at 1077, stating:

> We see no analogy between the facts presented in Anheuser-Busch and those in the instant case. Here, NRI did not bring about the disruption itself by insisting upon the enforcement minor work rules. The company was willing to, and did in fact suspend enforcement of its rules pending resolution of the underlying dispute through arbitration. In addition, the injury to NRI threatened by continued disruptions of employees at the Hot Spring plant, even in the absence of work rules, is clearly greater than the potential harm of having one's employees present an unsightly appearance to visitors at the plant.

As the Eighth Circuit pointed out, the *Anheuser-Busch* decision merely concluded that under the facts there presented, "there was not a showing of potential injury adequate to support relief under general equitable principles," while explaining that "in another case, there might be an adequate showing that employee disregard of work rules was seriously undermining an employer's ability to conduct his business." 562 F.2d at 1078, *quoting from, Anheuser-Busch, supra,* at 1100.

Thus, even if there were a requirement that the underlying dispute "threaten the arbitral process" in order to be subject to injunctive relief, that requirement has been satisfied in this case. Additionally, however, the contorted interpretation of this Court's decision in *Buffalo Forge Co. v. Steelworkers,* 428 U.S. 397 (1976) cannot be justified. While it is true that this Court stated (428 U.S. at 407) that "[s]triking over an arbitrable dispute would interfere with and frustrate the arbitrable processes by which the parties had chosen to settle the dispute," petitioners' partial quotation from that decision is misleading. This

Court made it clear that *any* strike over an arbitrable dispute is enjoinable where "[t]he quid pro quo for the employer's promise to arbitrate was the Union's obligation not to strike over issues that were subject to the arbitration machinery . . . Otherwise, the employer would be deprived of his bargain and the policy of the labor statutes to implement private resolution of disputes in a manner agreed upon would seriously suffer." *Ibid.* This Court went on to state that the reason for refusal to apply the *Boys Markets* rationale in *Buffalo Forge* was that the District Court in that case found "that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract." *Ibid.* In this case, however, the employees' refusal to log in and log out resulted from the employer's promulgation and implementation of a productivity program which included work rules, which work rules had been grieved by the Union. Thus, the violation of the no-strike clause by the employees was patently "over a dispute subject to arbitration." This being so, this Court's explanation of *Boys Markets* in *Buffalo Forge,* 428 U.S. at 411, is controlling: an injunction in this case pending arbitration was "esséntial to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract."

Petitioners would apparently require the district courts, faced with a request for a *Boys Markets* injunction, to engage in lengthy hearings on the merits. This, however, is explicity forbidden by *Buffalo Forge*: "[T]his would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly preempted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." Hence, neither *Boys Markets* nor *Buffalo Forge* mandate the result urged by petitioners, and the petition should be denied.

II. "Unfair Labor Practice" Strikes Are Not an Exception to the Boys Markets Rationale.

The Union then turns to an argument that if the employees' refusal to comply with the work rules was a response to unfair labor practices committed by the Company, injunctive relief would be forbidden by *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1976). Such an argument is entirely frivolous. First, a federal district court is without jurisdiction to determine whether conduct constitutes an unfair labor practice proscribed by the National Labor Relations Act. As this Court ruled in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and reiterated in *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962), "The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not exclusive and does not destroy the jurisdiction of the courts in suits under Section 301." As this Court further observed in *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 16 (1974), "This exception [*to Garmon*] was explicitly reaffirmed in *Motor Coach v. Lockridge*, 403 U.S. 274 (1971). It was fashioned because the history of Section 301 reveals that 'Congress deliberately chose to leave the enforcement of collective agreements to the usual processes of law' . . . Thus we have said that *Garmon* is 'not relevant' to actions within the purview of Section 301 . . ."

Consequently, petitioners would have this Court order that, in any case in which the Union alleged that unfair labor practices had been committed, the trial court would be precluded from enforcing the no-strike clause of the collective bargaining agreement and ordering arbitration until either the court or the NLRB had determined whether or not the conduct in question constituted an unfair labor practice. Were this so, the *Boys Markets* remedy would be deprived of any utility whatsoever, since injunctive relief to preserve industrial peace could be thwarted by the filing of an unfair labor practice charge.

Particularly incongruous is the penultimate paragraph of the Petition for Certiorari, wherein petitioners state, "during the period that collective bargaining agreements are in effect [unfair labor practice] strikes may occur more frequently than economic strikes, sympathy strikes or *strikes designed solely to enforce the contract*." (Petition, p. 22, emphasis supplied.) But the Union grieved the implementation of the work rules in addition to filing unfair labor practice charges. The conclusion to be drawn from the Union's argument seems to be that, although the grievance was filed, that grievance was not to be taken seriously; instead, only the unfair labor practice charge, which is in all respects identical to the grievance, is to be considered by the court in determining whether the wholesale violations of the work rule and the resultant disruption of Company operations may be enjoined.

But as this Court stated in *Boys Markets, Inc. v. Retail Clerks Int'l U.*, 398 U.S. 235, 249 (1970), "the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate."

Finally, it is significant that the Union has been unable to find *any* authority under *Boys Markets* for the proposition it advances. This issue was not articulated in either the Courts below, and, unsupported by a scintilla of judicial authority, should not be given cognizance here. Indeed, Respondent has found only one case which expressly deals with the *Boys Markets* injunction in an unfair labor practice context: In *Southwestern Bell Telephone Co. v. Communications Workers of America, Local 6222*, 343 F.Supp. 1165, 1172 (S.D.Tex. 1972), the trial court, relying upon *Mastro Plastics, Garmon, Lockridge* and *Boys Markets*, and pointing to the NLRB's deferral pro-

cedures established in *Collyer Insulated Wire*, 192 NLRB 150 (1971), stated:

> The only way out of the dilemma posed by *Boys Markets, Garmon* and *Lockridge*, is to go even further in favor of arbitration. Therefore, while assent to no strike-arbitration clauses is not necessarily a waiver of access to the Board over an unfair labor practice, it can be, and the inclusion of such clauses raises a presumption that unfair labor practice disputes, like any other disputes, are arbitrable unless otherwise specified. Having reached this conclusion, conduct which might be otherwise protected by *Garmon* and *Lockridge* is subject to the power of federal courts under 29 U.S.C. § 185(a) to enforce collective agreements and protect the arbitration process. The union's argument that the strike is shielded from injunctive relief because it was called in response to an unfair labor practice is rejected. (Citations omitted).

Judge Seals then noted:

> It must be recognized that the result adopted here means that from time to time (perhaps even here) federal courts will be enjoining lawful activity. However the determination of "lawfulness" and the right of the parties to resort to unilateral action must await the outcome of arbitration. Recognizing the potential for injustice here it is incumbent upon the courts to fashion their orders to protect the parties pending arbitration and to protect the integrity of the arbitration process.

343 F.Supp. at 1172, n. 9. *And* see, "Wildcat Strikes, Minority Concerted Activity—Discipline, Damage Suits and Injunctions," 24 Lab. L.J. 592, 602 (1973).

It should also be remembered that this Court's decision in *Arnold, supra*, arose out of a state court's injunction against a

contract violation which was also argued to be violative of 29 U.S.C. § 158(b)(4)(i)(D). Moreover, as the Fifth Circuit explained in *Lodge 12, Machinists v. Cameron Iron Works, Inc.*, 257 F.2d 467, 474 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958):

> Certainly, if an otherwise arbitrable controversy happens also to be an unfair labor practice, the parties should not be forced to abandon their contract right and to relegated 'to the slow and creaking procedure which, like a wounded snake, has dragged its slow length along, sans bargaining, sans labor peace, sans everything but pride of opinion, illtemper and frustration.' . . . Enforcement of a contract to arbitrate grievances is different from an adjudication of an unfair labor practice by the National Labor Relations Board . . . [the Lincoln Mills case] did establish two broad principles: first, that the United States district courts have the unequivocal statutory power to decree specific performance of collective bargaining contracts to arbitrate; and, second that private arbitration in the labor management field is to be afforded broad liberties.

Thus where the underlying dispute focuses upon interpretation of a contract clause designed to preserve the integrity of the grievance procedure, it is respectfully submitted that the trial court was correct in enjoining breaches of the no-strike clause and in ordering that the grievances be arbitrated. Accordingly, Petitioners' second basis for issuance of a writ of certiorari is also without merit.

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

CONSTANGY, BROOKS & SMITH
LOVIC A. BROOKS, JR.
EDWARD KATZE
CHARLES A. EDWARDS
Attorneys for Respondent
National Rejectors Industries

1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
404/525-8622